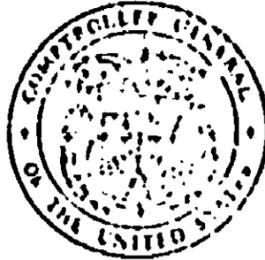


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

25708

FILE: B-209374

DATE: July 6, 1983

MATTER OF: Bean Dredging Corporation

DIGEST:

Claim for bid preparation costs where claimant alleges that agency was aware prior to bid opening that contract for dredging services could only be performed by firm which had exclusive access to disposal areas and therefore agency acted arbitrarily in failing to cancel the solicitation prior to bid opening is denied where agency states that it continued to receive assurances from the municipal authority responsible for providing disposal areas that sites would be made available and agency determined to cancel only after these promises were not fulfilled.

Bean Dredging Corporation requests reimbursement of its bid preparation costs under invitation for bids (IFB) No. DACW01-82-B-0098 issued by the Mobile District, U.S. Army Corps of Engineers. Bean contends that the Corps acted arbitrarily by failing to cancel the solicitation prior to bid opening after it allegedly acquired information which should have put it on notice of the fact that the required dredging services could be performed by only one firm. For the reasons that follow, we deny the claim.

The solicitation, issued on August 26, 1982, sought bids for maintenance dredging of portions of the Pascagoula Harbor, Jackson County, Mississippi, and the construction of dikes around disposal areas. The IFB specified three disposal areas (A, B, & C) which were to be supplied by the Jackson County Port Authority under an agreement it had with the Corps. The Port Authority was also responsible for paying for the dike construction around the disposal areas. The Corps surveyed the disposal areas in late August and learned that area A was then being used and would not

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be available to the Corps until October 30. The solicitation was amended to reflect this situation. Subsequently, the Corps was informed that area B would be unavailable for its use until the completion of another dredging project and that area C would be available only if the Port Authority agreed to delay its use for another project. Bids were opened on September 16. Bean was the low bidder and Williams-McWilliams Co. was second low. The Corps decided on September 29 to cancel the solicitation because the availability problems with disposal areas B and C meant that approximately 40 percent of the work specified in the IFB could not be performed.

Bean originally protested the cancellation of the solicitation; however, it now concedes that the cancellation was proper since the proposed disposal sites were not available. It instead contends that the Corps knew prior to bid opening that only McWilliams could perform the work because this firm had contracts with the Port Authority for the use of proposed disposal areas B & C, and that therefore the Corps acted arbitrarily in soliciting bids with the knowledge that those bids could not be considered.

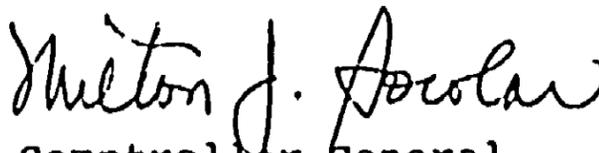
It is an implied condition of every IFB issued by the Government that each bid submitted will be fairly and honestly considered. Hub Testing Laboratories--Claim for Costs, B-199368.3, June 18, 1982, 82-1 CPD 602. If an unsuccessful bidder is able to prove that such obligation was breached and that it was put to needless expense in preparing its bid, it is entitled to recover its bid preparation costs. Heyer Products Co. v. United States, 140 F. Supp. 409, 135 Ct. Cl. 63 (1956).

Here, we do not find that the Corps' conduct violated this standard. We do not agree that the facts available to the Corps prior to bid opening indicated that McWilliams would be the only firm capable of performing the work because only it had a contract for disposal areas. While it is true that McWilliams was scheduled to perform dredging work for other parties and was apparently granted permits by the Port Authority for areas B and C for this other work, the Corps did not know of this other work until after the bid opening. The Corps acted reasonably to assure it, and it is not the duty of the decision maker

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cancel the solicitation, that arrangements would be made for joint use of some of the disposal sites and that alternate sites might be provided. Based on these assurances the Corps proceeded with the bid opening on September 16 and attempted to work with the Port Authority to gain access to disposal sites. It was only after these efforts failed that the Corps, on September 29, determined that cancellation was necessary. While the Corps was not successful in obtaining the necessary disposal areas from the Port Authority, we do not believe that its decision to open bids while it continued to pursue its discussions with the Port Authority was arbitrary or capricious.

We deny the claim.



Acting Comptroller General
of the United States